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PRE-APPEAL BRIEF REQUEST FOR REVIEW		Docket Number (Optional) 101.0093-02000	
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		First Named Inventor Gary K. Michelson	
		Art Unit 3733	Examiner James Swiger III

Applicant requests review of the final rejection in the above-identified application. No amendments are being filed with this request.

This request is being filed with a notice of appeal.

The review is requested for the reason(s) stated on the attached sheet(s).

Note: No more than five (5) pages may be provided.

I am the

☐ applicant/inventor.

☐ assignee of record of the entire interest.
See 37 CFR 3.71. Statement under 37 CFR 3.73(b) is enclosed.
(Form PTO/SB/98)

☒ attorney or agent of record.
Registration number 34,383

☐ attorney or agent acting under 37 CFR 1.34.
Registration number if acting under 37 CFR 1.34 _____


Signature

Thomas H. Martin
Typed or printed name

(330) 877-0700
Telephone number

April 20, 2007
Date

NOTE: Signatures of all the inventors or assignees of record of the entire interest or their representative(s) are required. Submit multiple forms if more than one signature is required, see below.

☒ Total of 1 forms are submitted.

This collection of information is required by 35 U.S.C. 132. The information is required to obtain or retain a benefit by the public which is to file (and by the USPTO to process) an application. Confidentiality is governed by 35 U.S.C. 122 and 37 CFR 1.11, 1.14 and 41.6. This collection is estimated to take 12 minutes to complete, including gathering, preparing, and submitting the completed application form to the USPTO. Time will vary depending upon the individual case. Any comments on the amount of time you require to complete this form and/or suggestions for reducing this burden, should be sent to the Chief Information Officer, U.S. Patent and Trademark Office, U.S. Department of Commerce, P.O. Box 1450, Alexandria, VA 22313-1450. DO NOT SEND FEES OR COMPLETED FORMS TO THIS ADDRESS. SEND TO: Mail Stop AF, Commissioner for Patents, P.O. Box 1450, Alexandria, VA 22313-1450.

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RESPONSE UNDER 37 C.F.R. 1.116
EXPEDITED PROCEDURE
EXAMINING GROUP 3733

PATENT
Attorney Docket No. 101.0093-02000
Customer No. 22882

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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In re Application of:)	Confirmation No.: 7390
Gary K. Michelson)	
Serial No.: 10/809,149)	Group Art Unit: 3733
Filed: March 25, 2004)	Examiner: James L. Swiger III
For: METHOD FOR USING ARCUATE)	
DYNAMIC LORDOTIC GUARD WITH)	
MOVEABLE EXTENSIONS FOR)	
FOR CREATING AN IMPLANTATION)	
SPACE POSTERIORLY IN THE)	
LUMBAR SPINE)	

Mail Stop AF
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Sir:

PRE-APPEAL BRIEF REQUEST FOR REVIEW

In reply to the Final Office Action of February 26, 2007 and subsequent Advisory Action of April 11, 2007, Applicant submits the following remarks for consideration by the Members of the pre-appeal brief conference.

I. Brief Background

The application includes one independent claim, claim 1, generally drawn to a method for inserting a spinal implant. Independent claim 1 stands rejected under 35 U.S.C. § 102(e). The rejection of claim 1 under 35 U.S.C. § 102(e) is the subject of this Request for a Pre-Appeal Conference.

II. Clear Errors

(1) The Examiner's rejection of claims 1-2, 4-13, 15, 17-19, 21-22, 25-30, and 44 under 35 U.S.C. § 102(e) as being unpatentable over U.S. Publication No.

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Reply to Final Office Action of February 26, 2007

2003/0135220 to Cauthen ("Cauthen") is erroneous because:

(a) contrary to the Examiner's Advisory Action, independent claim 1, as amended in an Amendment submitted November 20, 2006 in response to a Non-Final Office Action of May 18, 2006, recites a method for inserting a spinal implant comprising "rotatably articulating said guard about an axis that is generally perpendicular to the longitudinal axis of the spine to move said body from an open position to a closed position and said extension from an insertion position to a deployed position to move the adjacent vertebral bodies apart" (underline only added for emphasis);

(b) as shown in Figs. 2-5, 13 and 14, for example, the guard of the present application is generally indicated the numeral 100, and includes a body 102 with a first portion 104 and a second portion 106 that are pivotal about a hinge 120 having a pivot axis that passes through guard 100, where the pivot axis is perpendicular to the longitudinal axis of the spine;

(c) Cauthen teaches an insertion instrument (10) of Figs. 1 and 2 for retraction of a nerve root away from the lumbar dural tube having a handle (18) and a guide (20) extending therefrom pivotal about an articulating hinge (22), where, to retract the neural elements, guide 20 of insertion instrument 10 of Figs. 1 and 2 pivots about an axis generally parallel to the longitudinal axis of the spine using articulating hinge 22;

(d) Cauthen teaches an insertion instrument (10) of Figs. 13 and 14 for retraction of a nerve root away from the lumbar dural tube having a handle (18) with an associated guide (20) pivotal about an articulating hinge (22) and a handle (37) with an associated guide (35) pivotal about an articulating hinge (36), where, to retract the neural elements, guides 20 and 35 of insertion instrument 10 of Figs. 13 and 14 pivot about an axis generally parallel to the longitudinal axis to the spine using articulating hinges 22 and 36;

(e) unlike the guard of independent claim 1, guide 20 of Figs. 1 and 2, and guides 20 and 35 of Figs. 13 and 14 do not pivot about an axis generally perpendicular to the longitudinal axis of the spine; and

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(f) because Cauthen does not teach or suggest a method as recited in independent claim 1, claim 1 is patentable over the Examiner's rejection, and claims 2-44 dependent from independent claim 1, or claims dependent therefrom, are patentable at least due to their dependency from an allowable independent claim.

III. Conclusion

In view of the foregoing remarks, it is respectfully submitted that the claims are patentable. Therefore, it is requested that the Members of the Pre-Appeal Brief Conference reconsider the outstanding rejections in view of the preceding comments. Issuance of a timely Notice of Allowance of the claims is earnestly solicited.

To the extent any extension of time under 37 C.F.R. § 1.136 is required to obtain entry of this reply, such extension is hereby respectfully requested. If there are any fees due under 37 C.F.R. §§ 1.16 or 1.17 which are not enclosed herewith, including any fees required for an extension of time under 37 C.F.R. § 1.136, please charge such fees to our Deposit Account No. 50-3726.

Respectfully submitted,

MARTIN & FERRARO, LLP

Dated: April 20, 2007

By: Thomas H. Martin
Thomas H. Martin
Registration No. 34,383

1557 Lake O'Pines Street, NE
Hartville, Ohio 44632
Telephone: (330) 877-0700
Facsimile: (330) 877-2030